

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FRANKENMUTH MUTUAL INSURANCE  
COMPANY, as subrogee of PAUL KEMEZIS,  
and STATE FARM INSURANCE COMPANY, as  
subrogee of SUMMIT RIDGE CONDO  
ASSOCIATION,

Plaintiffs-Appellants,

v

DETROIT EDISON COMPANY,

Defendant-Appellee.

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UNPUBLISHED

July 12, 2005

No. 261394

Oakland Circuit Court

LC No. 2004-055669-CZ

Before: O’Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a trial court order granting defendant’s motion for summary disposition. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

**I. FACTS**

For approximately three years after Paul and Wilma Kemezis moved into their new condominium, they received electrical service, but never received a bill or paid for it. Then, without prior notification, defendant shut off their electrical service. The water pipes inside their condominium froze and burst, causing extensive water damage to the premises. Plaintiffs are the insurers of the damaged premises and sued to recover the amounts they paid to repair the condominium. Their complaint alleged two counts: 1) negligence, claiming that defendant had a statutory duty to provide notice before shutting off the power, and 2) “wrongful electrical shutoff,” asserting that defendant was required to notify plaintiffs’ insured pursuant to MCL 460.10. Defendant filed a motion for summary disposition, arguing that it had no duty to notify the Kemezises before shutting off the electrical service. The trial court agreed and granted summary disposition for defendant pursuant to MCR 2.116(C)(10).

**II. STANDARD OF REVIEW**

Summary disposition may be granted under MCR 2.116(C)(10) when “there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of

law.” In reviewing a motion under MCR 2.116(C)(10), which tests the factual support of a plaintiff’s claim, this Court considers de novo, and in the light most favorable to the nonmoving party, all pleadings, admissions, affidavits, and other relevant documentary evidence of record to determine whether any genuine issue of material fact exists to warrant a trial. MCR 2.116(G)(5); *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

### III. ANALYSIS

The pertinent definitions which provide clarity to this case are contained in both the Michigan Public Service Commission (MPSC) No. 9 and the Administrative Code<sup>1</sup>

Tariff 9, Rule B-2.5 provides that a 10 day notice of shut off of service must be provided to a customer before termination of service. The tariff states, in pertinent part:

The Company shall not shut off service pursuant to the provisions of B2.5 unless it transmits a notice, by first-class mail, to the customer or personally serves the notice not less than 10 days before the date of the proposed shut off.

Similarly, Tariff 9, Rule C-2.1(8) defines a customer as “[a] purchaser of electricity or natural gas that is supplied by the company for residential purposes.” Plaintiffs argue that the Kemezises were customers as defined in Rule C-2.1(8) because they purchased gas supplied by MichCon, a subsidiary of DTE Energy (DTE). It appears that the Kemezises were indeed customers of MichCon, a subsidiary of DTE, for the purpose of receiving natural gas. However, the Kemezises had not received a bill from DTE, the parent corporation of MichCon, for their use of electricity. It does not appear that the Kemezises tampered with or manipulated with their electric meter to falsely obtain electricity by fraudulent means. But for three years, they did not receive a bill for the consumption of electricity. The Kemezises, it would seem, were users of electricity, not paying customers per se of DTE. Thus, within the plain meaning of the rule, no shutoff notice was required.

Plaintiffs also argue that one does not “forfeit” one’s status as a customer by failing to pay because such an interpretation would render the notice provisions meaningless. Plaintiffs misconstrue the trial court’s ruling. The concept of “forfeiting” the status assumes that the status existed and was lost. Here, as the trial court observed, the Kemezises never paid for electrical service in the first instance, meaning, although they were users of the electrical service, because they never “purchased” it they never achieved customer status.

We agree with the trial court that the present case is analogous to *In re Sanders Estates*, 422 Mich 978; 374 NW2d 421 (1985), in which the defendant allegedly shut off electrical service without prior notification causing the occupants to use candles which then started a fire. Evidence showed defendant had previously provided notice and shut off service, but then service

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<sup>1</sup> Plaintiffs rely on the MPSC, Tariff 9, Section B-2.5 and C-2.1(8) whose cited provisions are similar, without any meaningful difference, to the provisions in the Administrative Code R 460.2163(1) and R 460.2102(5).

was restored without defendant's authorization. The Supreme Court adopted Judge MacKenzie's concurrence in *Sanders v Detroit Edison Co*, 147 Mich App 20; 383 NW2d 85 (1984), which found the unauthorized service to be a critical factor:

Regardless of whether Helen Brazill knew of or participated in the unauthorized restoration of power, it was undisputed that, prior to the power shutoff...power had been restored without defendant's authorization; and I agree with the trial judge that defendant was not required to comply with the notice requirements before terminating the unauthorized use of its power.

Judge MacKenzie's concurrence in *Sanders*, supra and the majority opinion of our Supreme Court acknowledge the existence of a duty to warn of service shutoff under certain regulations, 1979 AC, R 460.2163 and R. 460.2152. *Id.*, pp 25-26. But the view expressed in the concurrence and adopted by the Supreme Court was that there was no genuine issue of material fact because, at the time of the shutoff, the power was being used without authorization. *Id.*, p 27. Although the parties in *Sanders* did not rely on the tariff that the parties cite in the present case, one of the administrative rules cited by the majority, 1979 AC, R 460.2163, is substantially similar to the tariff on which the parties here rely:

(1) A utility shall not discontinue residential service pursuant to R 460.2161 unless written notice by first class mail is sent to the customer or personally served not less than 10 days before the date of the proposed discontinuance . . . .

"Customer" was defined in 1979 AC, R 460.2102(5) as "any purchaser of electricity or gas supplied by a utility for residential purposes." Therefore, the determination in *Sanders* that where service is not authorized, there is no genuine issue of material fact with respect to a claim based on the duty to warn of service shutoff is applicable here.

We reject plaintiffs' attempt to distinguish *Sanders* on the basis that there was no evidence that the Kemezises illegally turned on the service. It was not the illegality of the resumption of service that was critical in the reasoning of *Sanders*, but rather the unauthorized use of that service.

Plaintiffs argue that the trial court mischaracterized testimony and also committed clear error by viewing the facts in the light most favorable to defendant. However, plaintiffs offer no basis to conclude that the Kemezises purchased electrical service, and it is this fact that is material to the definition of "customer" on which the parties rely.

Finally, plaintiffs assert that defendant owed a common-law duty "which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). However, apart from a single sentence in their brief on appeal and another reference to *Clark* in plaintiffs' reply brief, plaintiffs do not discuss this alleged common-law duty. Accordingly, "this issue has not been properly presented for review because [plaintiffs have] given cursory treatment to the issue with little or no citation

to relevant supporting authority for [their] argument.” *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

Affirmed.

/s/ Peter D. O’Connell

/s/ Bill Schuette